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MICHAEL WODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-387

R. Trippett Boineau,

Petitioner,

vs.

Tarr Investments, a partnership; Sherbrook Associates, a Partnership; and Leroy Strasburger, individually and as a partner of Tarr Investments and Sherbrook Associates; and Alvin Strasburger, individually and as a partner of Tarr Investments and Sherbrook Associates,

Respondents

and

R. Trippett Boineau,

Petitioner,

vs.

United States Trust Company of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF
SOUTH CAROLINA

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(iiii)

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R. Trippett Boineau,

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United States Trust Company of New York,

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF
SOUTH CAROLINA

Petitioner R. Trippett Boineau respectfully
prays that a Writ of Certiorari be issued to review
the per curiam decision of the Supreme Court of
South Carolina entered in this proceeding on May
29, 1979, and the Order of said Court entered June
11, 1979 denying petitioner's Petition for Rehear-
ing.

OPINIONS BELOW

The per curiam Opinion of the Supreme Court of South Carolina herein concerned, Memorandum Opinion No. 79-96, filed May 29, 1979, is not reported but is set forth in the Appendix hereto at page 12. The Order denying petitioner's Petition for Rehearing, filed June 11, 1979, is not reported but is set forth in the Appendix hereto at page 13. The Order of the trial court is not reported but is set forth in the Appendix at page 14.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3). The judgement of the Supreme Court of South Carolina, dated and entered May 29, 1979, Rehearing Denied June 11, 1979, violates the rights of petitioner to the due process of law and the equal protection of the laws granted him by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

When petitioner's previous attorney, for reasons personal to him and without fault on the part of petitioner, withdrew at the commencement of the trial, did the the trial court's refusal to grant petitioner's motions for a continuance, for a voluntary non-suit and even for a temporary recess, to permit him to engage other counsel, thereby forcing petitioner to proceed to trial without the aid of counsel, constitute a denial of the due process of law and/or the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Amendment V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section I:

". . . (N)or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, who at one time had been the partner holding the largest partnership interest in the partnership known as (respondent) Tarr Investments, brought action (Calendar No. 1263) against the partnership and the other two original partners to have the Court declare a constructive trust in his favor in the substantial and valuable tracts of land owned by the partnership. (A separate action, Calendar No. 1315, was brought shortly thereafter against the same respondents and, later, still a third action, Calendar No. 1424, was brought against respondent United States Trust Company of New York, to whom a portion of the real estate involved had been sold by the original respondents. All three cases involved substantially the same substantive issues and were ultimately consolidated for trial).

After various preliminary proceedings, none of which involved the ultimate merits of petitioner's case, the case came on for trial before the Court of Common Pleas of the Fifth Judicial Circuit (Richland County) of South Carolina. When

the case was called, petitioner's then attorney offered a written motion, signed by petitioner pro se but not by his attorney, that the trial judge (a County Court judge sitting as Circuit Judge by special assignment) disqualify himself on the ground of bias and prejudice. The trial judge ruled that the motion would have to be signed by petitioner's attorney or it would not be considered. Petitioner's attorney thereupon withdrew as counsel.

Petitioner then moved that the case be continued because of his lack of counsel to represent him during the trial. The trial judge refused the motion (Transcript of the record before the Supreme Court of South Carolina 250; Appendix).

Petitioner then tendered to the Court the motion to disqualify himself previously offered by Mr. Brooks. The trial judge refused to consider the motion (Tr. 251; Appendix).

Respondent's counsel moved to consolidate all three cases for trial. Petitioner objected. The trial judge granted the motion (Tr. 261).

Petitioner renewed his request for a continuance until he could secure new counsel to represent him. The trial judge refused the motion (Tr. 251; Appendix).

Petitioner again asked the court for a recess or continuance until he could get new counsel. The trial judge denied the motion (Tr. 262; Appendix).

Petitioner then moved for a voluntary nonsuit without prejudice in all three cases. The trial judge denied the motion (Appendix).

Petitioner renewed his motions for a nonsuit or for a continuance for a sufficient period of time to permit to engage a new attorney. The trial judge denied both motions (Tr. 264; Appendix).

The trial then proceeded, lasting from 2:30 p.m. until 7:52 p.m. (two hours after the Court's announced recess time of 6:00 p.m. and three hours after the Court's usual recess time), with no break for supper (Tr. 331, 352, 355, 403).

The trial began again at 9:00 a.m. the next day (an hour ahead of the Court's usual starting time). Petitioner's present counsel appeared and stated that he would be willing to represent petitioner provided the case were continued long enough to permit him to familiarize himself with it. The trial judge refused to continue the case (Tr. 409-412).

Petitioner was unable to proceed, and rested his case (Tr. 413).

Some time later, the trial judge signed and filed an order finding in respondents' favor on all questions in all three cases, ordering the lis pendens filed by petitioner stricken, and the bond money (deposited in escrow pursuant to a Circuit Judge's previous order) released.

Petitioner thereafter in due time appealed to the Supreme Court of South Carolina. That Court, however, in a brief, 3-sentence per curiam decision, found no abuse of discretion or error of law, and dismissed petitioner's appeal.

THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND PRESERVED BEFORE THE TRIAL COURT

Since the Federal constitutional questions herein concerned involve the conduct of the trial itself, they were not involved in the pleadings in the case. They were raised by petitioner, however, at the start of the trial (Transcript of record before the Supreme Court of South Carolina, 249-264; Appendix hereto 21) and specifically raised by petitioner's present counsel as soon as he came into the case during the course of the trial. (Transcript of record before Supreme Court

of South Carolina; 409-413; Appendix 25).

Exceptions to the trial judge's ruling on petitioner's above motions were duly taken on petitioner's appeal to the Supreme Court of South Carolina (Transcript 424-428; Appendix 28).

The constitutional questions were again raised by petitioner in his petition to the Supreme Court of South Carolina for a rehearing (Appendix 31).

REASONS FOR GRANTING THE WRIT

The Courts of this country, particularly this Honorable Court, have in recent years made tremendous strides in establishing procedural rules to protect the interests of defendants in criminal cases - even habitual criminals charged with (and quite probably guilty of) serious crimes involving violence and even depravity. See for example Powell vs. Alabama, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932); Miranda vs. Arizona, 394 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR 3d 974 (1966).

These rights are gradually being extended downward to lesser crimes and types of proceedings, such as cases involving minors, habeas corpus proceedings, commitment of incompetents, and even quasi-judicial administrative proceedings. Chandler vs. Fretag, 348 US 3, 99 L Ed 4, 75 S Ct 1 (1954); "Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administrative Proceedings", by Roy M. Brisbois, UCLA L Rev. 18, 758 Mr. 1971.

Civil cases, however, which frequently involve considerations of even greater importance to the parties involved, such as petitioner's claim here, have received relatively little attention, and relatively little progress has been made in spelling out the procedural rights of litigants in civil cases.

The present case affords this Court an opportunity to up-date some of the principles involved in the question of what constitutes "due process of law" and "the equal protection of the laws" in the trial of civil cases.

The statutes, rules of court and the court decisions construing these statutes and rules of court in South Carolina provide little help in understanding what these terms mean as far as practical application is concerned.

The most positive statement on the grounds for the grant or refusal of a motion for a continuance is found in Rule 27 of the Rules of Practice of the Circuit Courts of South Carolina. See Appendix.

This rule, however, is unfortunately limited by its own terms to motions for a continuance based on the absence of a witness. In other situations a trial court must depend upon the general rule that such motions rest in the "sound discretion" of the trial court. See Annotation to Rule 27 (Code of Laws of South Carolina of 1976, Volume 22, page 122, et seq.). The decisions, however, frequently reach opposite results in very similar situations. See Brunson vs. Hamilton Ridge Lumber Co., 122 SC 436, 115 SE 624 (1932) (following the general rule); Graham vs. Greenville City Coach Lines, 233 SC 175, 104 SE 2d 72 (1958) (reversing the trial judge's refusal to grant a continuance).

Even the most recent decision by this Honorable Court cited by respondents in their brief before the Supreme Court of South Carolina, Ungar vs. Sarafite, 376 US 575, 11 L Ed 2d 921, 84 S Ct 841 (1964), speaks in the same language of "sound discretion", saying, at 376 US 575, 589, 11 L Ed 2d 921, 84 S Ct 841, 849-850 (1964):

"The matter of a continuance is traditionally within the discretion of

the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

In the present case the Supreme Court of South Carolina took the easy way out, sprinkled the holy water of the term "judicial discretion" over the rulings of the trial court challenged on petitioner's appeal, found no abuse of discretion or error of law, and summarily dismissed petitioner's appeal. The per curiam decision did nothing to clarify or amplify the South Carolina law which trial courts must apply in ruling on motions for continuances in the future.

The applicable South Carolina law governing the grant or refusal of motions for a voluntary non-suit are almost equally vague.

Rule 18 of the Rules of Practice of the Circuit Courts of South Carolina (Code of Laws of South Carolina of 1978, Volume 22, page 115) provides as follows:

" . . . A motion for a nonsuit must be reduced to writing by the moving counsel, or by the Stenographer, under the direction of the Court, stating the grounds of the motion."

This rule, however, applies only to involuntary non-suits and, even there, only requires a written statement of the grounds for such a motion.

Rule 45 of the Rules of Practice of the Circuit Courts of South Carolina (Code of Laws of South Carolina of 1976, Volume 22, Page 182 of 1978 Supplement) sets out the rule as to the grant of a voluntary non-suit or dismissal. This rule is printed in full at page of the Appendix hereto.

Here again the decisions of the South Carolina Supreme Court all come back to the same vague standard "sound discretion of the trial court." Cunningham vs. Independent Insurance Co., 182 SC 520, 189 SE 800 (1937); Parnell vs. Powell, 191 SC 159, 3 SE 2d 801 (1939); Romenus vs. Biggs, 217 SC 77, 59 SE 2d 645 (1950).

Petitioner also moved for a temporary recess to permit his replacement counsel to familiarize himself with the case and then, when this was denied, also moved even for a temporary recess to give him time to procure the witnesses he needed to present his case (These motions were also denied).

Under the rules and principles followed by South Carolina courts motions for a temporary recess are also addressed to the sound discretion of the trial court and are governed by the same rules that govern continuances - through a lesser showing of cause may be sufficient, since the delay requested is less.

This practice brings us back again to the same old vague standard - "sound discretion of the trial court" - whatever that means.

Unfortunately the rule apparently followed by most of the other states of the United States as to the grant or refusal of motions for continuances, voluntary non-suits and temporary recesses are similar to the rules followed in South Carolina. 53 Am Jur 42, Trial §24; 53 Am Jur 43, Trial §25; 24 Am Jur 2d 7, Dismissal, etc. §6; 75 Am Jur 2d, 164, Trial §51; 75 Am Jur 2, 165, Trial §52; 27 CJS 325, Dismissal, etc. §65; 88 CJS 90, Trial §35.

88 CJS 304, Trial §157; Annotation 48 ALR 2d 1150, annotating the decision in Finch vs. Wallberg Dredging Co., 76 Idaho 246, 281 P 2d 136 (1955).

The right of a party to be represented by counsel in civil actions has been recognized in recent decisions of this Court. Armstrong vs. Manzo, 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187 (1965), reversing a decision by the Texas Court of Civil Appeals in a child custody case and holding that:

"A fundamental requirement of due process is 'the opportunity to be heard' . . . an opportunity which must be granted at a meaningful time and in a meaningful manner." (Emphasis added).

This language was quoted with approval in Fuentes vs. Shavin and Parham vs. Cortese, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1893 (1972), holding that the claim and delivery statutes of Florida and Pennsylvania allowing pre-judgment seizure of the property involved were constitutionally invalid and defective in depriving the defendant of due process of law.

Petitioner respectfully submits that this Court should go on from this decision, grant certiorari in this case, and spell out in more detail than can be found now the principles governing the right to counsel in civil cases and the rights of litigants in civil cases to the grant of motions for a continuance, or a voluntary non-suit, or a temporary recess, where a party, without fault on his own part, finds himself in the position of being forced to go to trial without the aid of trial counsel. The present law, reducing the terms "due process of law" and "the equal protection of the laws" to little more than the term "sound discretion of the trial court," leaves the litigants (and the

trial court) in civil cases adrift upon an endless sea, without chart or compass to guide them. To leave the rights of litigants in civil cases to the "sound discretion" of the trial court is really begging the question and does not provide an adequate answer. This case provided an opportunity for this Court to set out specifically the beacons and markers to guide civil litigants and trial courts in future cases and, incidentally, to rectify the injustice which the present outcome of this case, if allowed to stand, will constitute.

CONCLUSION

It is respectfully submitted that the question presented here for review is meritorious; that the question is of general importance in applying Federal constitutional law to the trial of civil action; that up to this point in this case petitioner has been denied the right guaranteed him by the Fifth and Fourteenth Amendments to be represented by counsel and to present his case at a meaningful time and in a meaningful way with the aid of counsel; and that consequently this Court should grant certiorari in this case; review the record (to the extent it even exists at this point), and reverse the decisions of the trial court and of the South Carolina Supreme Court, and remand the case for a full trial of petitioner's case on its merits.

Respectfully submitted,

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P. O. Box 12014
Columbia, SC 29211
(803) 799-9472
Attorney for petitioner

Columbia, SC

August 27 , 1979.

APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

R. Trippett Boineau, Appellant,
v.

Tarr Investments; Sherbrook
Associates; and Leroy Strasburger,
individually and as a partner of
Tarr Investments and Sherbrook
Associates; and Alvin Strasburger,
individually and as a partner of
Tarr Investments and Sherbrook
Associates, Respondents

and
R. Trippett Boineau, Appellant,
v.
United States Trust Company of New York, . . . Respondent.

Appeal From Richland County
Owens T. Cobb, Jr., County Judge

Memorandum Opinion No. 79-96
Filed May 29, 1979

APPEAL DISMISSED

Irvine F. Belser, Jr., of Columbia, for appellant.

Thomas E. McCutchen and Stewart P. Hayes, both of Whaley,
McCutchen & Blanton, for respondents Tarr Investments, et
al.; and Hamilton Osborne, Jr., of Boyd, Knowlton, Tate &
Finlay, for respondent U. S. Trust Co. of New York, all of
Columbia.

PER CURIAM: The appeal before us involves questions of discretion on
the part of the trial judge. After hearing argument of counsel and reviewing the
entire record, we are of the unanimous opinion that there was no abuse of discretion;
no matter of precedent is involved, and no error of law appears. The appeal is
therefore dismissed under our Rule 23.

s/ J. Woodrow Lewis	C.J.
s/ Bruce Littlejohn	A.J.
s/ J. B. Ness	A.J.
s/ Wm. L. Rhodes, Jr.	A.J.
s/ George T. Gregory, Jr.	A.J.



The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

June 11, 1979

P.O. BOX 11330
COLUMBIA, S.C. 29211

Irvine F. Belser, Jr., Esquire
P. O. Box 12014
Columbia, South Carolina 29211

Re: R. Trippett Boineau v. Tarr Investments, et al.

Dear Mr. Belser:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ Wm. L. Rhodes, Jr. A.J.

s/ George T. Gregory, Jr. A.J."

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith

CLERK

FHS/r1

cc: Thomas E. McCutchen, Esquire
Hamilton Osborne, Jr., Esquire

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ORDER OF THE COURT OF COMMON PLEAS FOR
RICHLAND COUNTY, SOUTH CAROLINA

ORDER

The above three (3) cases came on to be heard by me at a scheduled term of the Court of Common Pleas on February 21, 1978. All three (3) cases appeared on the trial roster. At the call of the three (3) cases a written motion was presented for me to disqualify myself. The motion and attached affidavit were signed by Mr. Boineau pro se. Mr. Walter Brooks, attorney, also appeared for the plaintiff. I asked Mr. Brooks if that was his position and Mr. Brooks then moved to withdraw as counsel for R. Trippett Boineau, which motion was granted. I refused to disqualify myself as Trial Judge. Mr. Brooks remained at the trial table and conferred with Mr. Boineau frequently during the trial, Mr. Boineau then moved to continue the cases. I observed that Mr. Boineau had represented himself in Calendar No. 77-CP-40-1315 from the inception and that Calendar No. 77-CP-40-1263 is identical except for signatures. Mr. Boineau also represented himself in Calendar No. 77-CP-40-1424. I noted that the cases had been previously set for trial but continued because Judge Nicholson had disqualified himself. I noted that the order of Judge Grimball had set all three (3) cases for February 21, 1978. I also noted that said order had been served upon Mr. Brooks as attorney and also upon Mr. Boineau, pro se. I refused the motion to continue the cases.

Counsel for the defendant United States Trust Company moved to try the three (3) cases together; counsel for the remaining defendants consented; Mr. Boineau objected. The issues raised in the proceeding against United States Trust Company are a part of the controversy asserted in the other suits, which pleadings are identical. The proceedings are equitable and should be tried together to conserve time and

expense. Barrett vs. Broad River Power Co., 146 S.C. 85, 143 S.E. 650; DeTriville vs. Groover, 219 S.C. 335, 65 S.E. 2d 232; Farmers' and Merchants' National Bank vs. Foster, 132 S.C. 410, 129 S.E. 629. The motion to consolidate the three (3) cases for trial was granted.

A question relating to a motion addressed to an order of Judge Grimball was then raised. The record reveals that the appeals from the orders of Judge Grimball had been dismissed. I determined that no such motion was before me or should stay the trial of the three (3) cases.

Counsel for United States Trust Company then raised a question of contempt on the part of the plaintiff. I stated that no such proceeding was before the court on a rule to show cause. My ruling thereupon is without prejudice to the rights, if any, of the United States Trust Company with regard to said subject matter.

Mr. Boineau then moved for a voluntary non-suit without prejudice. The defendants objected to same. In view of the events which have heretofore occurred in these suits, as revealed by the record, the order setting these cases for trial (special order), the presence of the parties, the presence of witnesses, the counterclaim and affirmative relief asserted by the defendants, the objection of the defendants, I refused the motion for a voluntary non-suit without prejudice.

The plaintiff then offered the transcript of July 29, 1977 in lieu of testimony. The defendants did not object provided all cross-examination was included. Said transcript was accepted as plaintiff's case. The plaintiff then rested. The defendants moved for a non-suit. I took the same under advisement and the defendants then presented evidence consisting of witnesses, documents, records and prior court proceedings. The defendants completed their presentation on February 21, 1978. On February 22, 1978 Mr. Irvine F. Belser, Jr., an attorney, appeared and stated he was willing to represent Mr. Boineau if the cases could be continued and he made a motion to continue the cases. I refused the motion. Mr. Belser then withdrew.

Mr. Boineau requested time to subpoena witnesses. This request was denied. I asked Mr. Boineau if he had any additional evidence to present and he had none.

I have carefully considered the pleadings, the files, the testimony, the transcript of July 19, 1977 and the exhibits.

I find that Tarr Investments, a partnership, was formed on or about April 13, 1966, amended October 14, 1966. The general partners were R. Trippett Boineau, the plaintiff, and Leroy Strasburger and Alvin Strasburger, two of the defendants. I find that Mr. Boineau became delinquent in capital contributions to the partnership, that the two individual defendants advanced moneys for the plaintiff and/or loaned moneys to the plaintiff and took an assignment of the partnership interest of the plaintiff as security for said loans. I find that the plaintiff failed to repay the notes (moneys advanced) due to the individual defendants and suits were instituted against Mr. Boineau to collect the amounts due.

I find that the suits were dismissed in return for the cancellation of the indebtedness of the plaintiff to the individual defendants and the conveyance of the plaintiff's entire interest in Tarr Investments, subject to a repurchase option, the same being evidenced by the written agreement dated November 8, 1971.

I find that the plaintiff executed a conveyance of his entire partnership interest in Tarr Investments to the individual defendants, the same being recorded in the Office of the Clerk of Court for Richland County in Deed Book D-225 at Page 66. The repurchase option expired on March 30, 1972, but it was extended to June 1972. I find that the repurchase option expired in June 1972 and I further find that no repurchase option existed or was intended after June 1972.

I find that the plaintiff failed to exercise his repurchase option by June 1972 or within any period to which his repurchase option was extended.

I find that Leroy Strasburger and Alvin Strasburger are the sole partners of Tarr Investments

and have been the sole partners since November 11, 1971. I find that Leroy Strasburger and Alvin Strasburger are the sole partners in Sherbrook Associates, I find that the plaintiff R. Trippett Boineau has no legal or equitable interest in Tarr Investments or Sherbrook Associates.

I find that R. Trippett Boineau has no legal or equitable interest in the properties, assets or funds of Tarr Investments, Sherbrook Associates or the properties purchased by the United States Trust Company from Tarr Investments and Sherbrook Associates or the funds expended by United States Trust Company to Tarr Investments and/or Sherbrook Associates. I find that plaintiff has failed to produce any evidence that United States Trust Company of New York took the property which it purchased from Tarr Investments and Sherbrook Associates with notice of any claim, right or interest of the plaintiff in said property.

I find that United States Trust Company of New York as Trustee holds all properties described in the deed dated July 22, 1977, which is recorded in the office of the Register of Mesne Conveyances of Richland County in Deed Book d-430 at Page 381 free and clear of any claim, ownership, right, option or interest of R. Trippett Boineau.

I find that Leroy Strasburger and Alvin Strasburger made large payments (for indebtedness and otherwise) on behalf of Tarr Investments and Sherbrook Associates from November 11, 1971 and that the plaintiff has not tendered or repaid the same.

I find that the plaintiff failed to institute any action against the defendants for the alleged recovery of and/or transfer of said property. I further find that the plaintiff's claim is barred by laches.

I find that the plaintiff, R. Trippett Boineau, did not transfer his interest in Tarr Investments to Leroy Strasburger and Alvin Strasburger under any understanding or agreement, oral or written, except the repurchase option of November 11, 1971. I find that the transfer of the interest of the plaintiff in Tarr Investments to Leroy Strasburger

was not made in anticipation of obtaining a loan from the Federal Land Bank.

I find that there was no agreement between the plaintiff and the individual defendants to use any part of the Federal Land Bank loan to pay the arrearage of the plaintiff in the capital contributions to Tarr Investments. I further find that there was no agreement between the plaintiff and the individual defendants to deliver to plaintiff any portion of the proceeds of the Federal Land Bank loan.

I find that the plaintiff assigned his interest in Tarr Investments to the individual defendants on March 29, 1971.

I find that there was no agreement between the plaintiff and the individual defendants to substitute any other option for that of November 11, 1979 (except to extend the time to June 1972). I find that the individual defendants did not agree with plaintiff that a contract to sell a five hundred fifty-nine (559) acre parcel or any other parcel would constitute a compliance with the repurchase option of plaintiff.

I find that Tarr Investments has continued to exist since November 11, 1971.

I find that no offer was made by Wyman Boozer and no contract with Wyman Boozer existed or was potentially available.

I find that the defendants Leroy Strasburger and Alvin Strasburger each own a fifty (50%) per cent interest in Tarr Investments.

I find that the individual defendants did not hold any interest in Tarr Investments and/or Sherbrook Associates or their assets for the benefit of or in trust for R. Trippett Boineau.

I conclude that the plaintiff is without merit, that the plaintiff has failed to carry the burden of proof required to establish a constructive trust, and that the plaintiff has not established any claim by the preponderance of the evidence.

I conclude that the defendants have prevailed and that the plaintiff is not entitled to any relief,

and the plaintiff's claims are hereby dismissed with prejudice.

The only evidence presented by plaintiff consisted of the transcript of the proceedings before the Honorable John Grimball on July 29, 1977 by virtue of which the court determined that the transfer recorded in Deed Book D-430 at Page 381 in the office of the Register of Mesne Conveyances for Richland County was free and clear of any claim of the plaintiff or any lis pendens filed by or for plaintiff. The order of the Honorable John Grimball of July 22, 1977 in Calendar No. 77-CP-40-0823 may indeed be res judicata of some questions here asserted by plaintiff. The proceedings by or on behalf of plaintiff with regard to filing the various lis pendens concern this court.

This order is without prejudice to the rights of the defendants, if any, to assert violations, if so, of prior orders of Judge Grimball.

IT IS ORDERED that R. Trippett Boineau be and he hereby is restrained from filing or procuring or authorizing or directing any further or additional filing of any lis pendens relating to this action or any other action against Tarr Investments and/or Sherbrook Associates and/or Leroy Strasburger and/or Alvin Strasburger and/or United States Trust Company of New York or their respective successors or assigns and describing all or any portion of the real property itemized, set forth and described in the Exhibit marked "A" attached hereto and herewith incorporated by reference for the purpose of identifying the real properties in question (omitted in transcript), or employing any person to file such a lis pendens.

IT IS FURTHER ORDERED that the Fifty Thousand (\$50,000.00) Dollars hereto deposited in escrow with a building and loan association or bank pursuant to the order of Honorable John Grimball dated August 8, 1977 and all accrued interest thereon be immediately released and delivered to Leroy Strasburger and Alvin Strasburger and any escrow agent or trustee is herewith ordered and directed to deliver said Fifty

Thousand (\$50,000.00) Dollars plus accrued interest immediately to Leroy Strasburger and Alvin Strasburger.

The Clerk of the Richland County Court (and/or the Register of Mesne Conveyances as it may apply, if so) is hereby directed to strike and cancel all lis pendens heretofore filed by or on behalf of R. Trippett Boineau in cases bearing No. 77-CP-40-0823, No. 77-CP-40-1315 and No. 77-CP-40-1424.

Nothing herein contained shall prohibit the defendants and/or the United States Trust Company to apply to the court for such ancillary or supplemental relief as may be appropriate or justified by virtue of the various proceedings brought by or on behalf of the plaintiff or by virtue of the relief set forth herein.

The defendants have established a complete defense to all causes asserted by the Plaintiff and judgement is herewith in favor of the defendants in all cases.

All costs are herewith assessed against the plaintiff.

ALL OF WHICH IS SO ORDERED.

/S/ Owens T. Cobb, Jr.
Special Presiding Judge
of the Court of Common
Pleas for Richland
County

Columbia, South Carolina

March 3, 1978.

APPENDIX

EXCERPTS FROM TRANSCRIPT OF RECORD AND
PETITION FOR REHEARING RELATIVE TO
PRESERVATION OF CONSTITUTIONAL QUESTION

(a) Motions by petitioner for continuance
and/or voluntary non-suit (Transcript 249-250,
252, 261-264)

TRANSCRIPT 249-250

THE COURT: All right, sir. Now, Mr. Boineau,
are you ready to go forward with the matters?

MR. BOINEAU: Your Honor, you know as much
about this situation as I do. I frankly am some-
what shocked. I don't see how I can go forward.

THE COURT: Well, Mr. McCutchen has told me
the urgency of the matter.

MR. BOINEAU: I heard.

THE COURT: I think I am going to have to go
forward with it, unless you can give me some rea-
sons why I should not.

MR. BOINEAU: It is a fairly large case, as
Mr. McCutchen said, with substantial money and at
this time I'm without counsel totally by surprise.

THE COURT: You see, I do not know the rea-
son you and your counsel have done what you have
done. It may be a purely private matter between
you, it may be something unavoidable, these are
things that I do not know; but in the interest
of proceeding with the matter to a conclusion,
with the important aspects that it has, I'm
going to have to go ahead.

All right, now, a motion was handed up to
me a minute ago which I handed back to disqualify
myself. Do you want to make that motion at this
time?

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MR. BOINEAU: Now, I have got to go ahead?
There is no way out? Because, you know, it really
is a rather large proposition and rather strange
terms just occurred here. If you could give me
until the morning to get counsel or just any-
thing--

THE COURT: I will put down that you made
a motion to continue the matter and I deny it.

TRANSCRIPT 252

THE COURT: . . . All right. Are there any
other motions, Mr. Boineau?

MR. BOINEAU: Just one second.

Your honor, I am apparently being forced
to move forward, much against my will. I'm
totally unprepared and totally suprised.

TRANSCRIPT 261-264

THE COURT: . . . Mr. Boineau, you are the
plaintiff. You may proceed with the evidence.

MR. BOINEAU: Your Honor, I move for a
continuance. During the recess I contacted an
attorney who said that he would be able to help
us in the morning.

THE COURT: Well, I have already ruled and
denied that so there is no need to keep going
over that.

MR. BOINEAU: Your Honor, I think you saw
what happened here. It is a terrible surprise
and there is an awful lot at stake. During
the recess I got ahold of an attorney who said
he can be here in the morning. He has something
this afternoon and couldn't come up.

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THE COURT: I will put that in the record as additional information. The motion is denied.

I set it at the roster meeting today, I have other cases already set, I cannot change it.

For the record, we started at 10:00 o'clock and we have got ten cases and I'm not going to strike those ten cases to allow you to get an attorney.

It is your case, Mr. Boineau, and you may proceed and present evidence.

MR. BOINEAU: Your Honor--

THE COURT: Yes, sir?

MR. BOINEAU: I would move for voluntary nonsuit without prejudice. At this time I'm totally unprepared. I have no counsel.

THE COURT: All right. What do you say, Mr. McCutchen?

MR. MCCUTCHEN: Your Honor, we oppose it. As I said, in this case, this particular instance--

THE COURT: You object? That is all I want to know.

MR. MCCUTCHEN: Yes. I object.

THE COURT: Do you object?

MR. OSBORNE: Mr. Boineau signed the pleadings--

THE COURT: I just want to know--

MR. MCCUTCHEN: We object and we want to go forward and have an affirmative ruling.

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THE COURT: All right. Motion denied.

MR. BOINEAU: Your Honor, it is my understanding of the law that the plaintiff can move at any time for voluntary nonsuit without prejudice.

THE COURT: No, sir.

MR. BOINEAU: May I just ask the court a question then?

THE COURT: All right, sir.

MR. BOINEAU: As I understand it, I must take the stand and cross examine myself, in effect--examine myself. That is the dilemma that I find myself.

THE COURT: In effect you take the stand and just sort of ask yourself questions or just make your narrative statement as to your case. You don't have to cross examine yourself, as I see it, just get a narrative statement or why you think you are entitled to the release that you had asked for in these lawsuits. Then counsel will have the opportunity to cross examine you.

MR. BOINEAU: Thank you, sir.

THE COURT: Is that what you want to do?

MR. BOINEAU: I think your Honor gave me no other choice. I say I am unprepared--

THE COURT: I give you the choice of presenting the evidence or not.

MR. BOINEAU: I mean, the nonsuit is not allowed?

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THE COURT: Right, non-suit is not allowed.

MR. BOINEAU: I can't get another attorney?

THE COURT: That's right.

MR. BOINEAU: And I am totally unprepared.

THE COURT: All right. If you have got any evidence let's go forward with it.

(b) Renewed motion by petitioner for continuance and/or temporary recess (Transcript 409-413)

MR. BELSER: May it please the court, before we proceed any further, I am Irvine F. Belser, Jr., a member of the Bar. Mr. Trippett Boineau, who I have known personally for a number of years and have had a number of business dealings with, all of them satisfactory, called me. He said that for certain reasons that his present counsel had been forced to disqualify himself and withdraw as counsel, which left Mr. Boineau without counsel and would I consider taking over representation of the case.

I told him I had other matters to look into the rest of the afternoon and I would talk to him further last night. He called me last night and it was like 10:00 o'clock.

We discussed it very briefly and I told him I would be willing to go into it, so long as I had time to familiarize myself with the pleadings and issue presently before the court, and I would come with him this morning to tell the court that I was willing to represent him provided I had time in which to prepare myself.

Between 10:00 o'clock and this morning, I obviously have not had time to even look at the record. I am not even familiar with the caption

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of the case or a chance to familiarize myself with what is before the court at this moment, or to subpoena witnesses for whatever further testimony he may need to introduce to protect his interest in the case.

Now, it is my understanding that this is a non-jury matter presently before the court, basically, on its merit, and not on a motion for a summary judgment or demurrer or anything of that sort, and there is no jury present.

The only other persons in court are local parties, who are present, or other attorneys who are present. This court is holding a two day non-jury term of court with numerous other matters scheduled. It would be very easy for this court to postpone this matter for not less than a week, I would think 30 days would be more appropriate, to permit me to familiarize myself with the case and Mr. Boineau to otherwise prepare himself to go forward.

I think a failure under these circumstances to grant this request is a denial of due process. Mr. Boineau happens to be an attorney, but he is also a private citizen. He has a right to be represented by counsel.

There is an old saying that any lawyer who represents himself has a fool for a client. There is a lot of truth to that. A lawyer cannot display the independent judgment in order to represent himself effectively. If he testifies as a witness, he disqualifies himself as an attorney.

So, Mr. Boineau is hopelessly boxed in and will be unable to protect his own interest in this case.

Now, the courts do not exist for the benefit of the court or clerk, but for the benefit of the

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litigants and lawyers who practice in that court. Now, Mr. Boineau is not a defendant in this case, he is a plaintiff, and he is invoking the aid of this court in order to permit him to present--

THE COURT: Excuse me. I hate to interrupt you, but you told me that you are willing to appear but you have not told me you are his lawyer and now you are pleading his case. So, I have to know whether you are appearing now as his counsel or what.

MR. BELSER: I am appearing as his counsel for the purpose of asking for a continuance to permit me to familiarize myself with the case. If Your Honor refuses that, I will walk out the door, because I can't represent a client without having ever read the pleadings or talking to the client.

I am respectfully asking you to grant Mr. Boineau and my, his attorney, a reasonable continuance within which I can familiarize myself with the case. I think due process requires no less.

THE COURT: All right, sir. Well, I have considered your motion. I reached the opinion that it was necessary to proceed with the case yesterday and we are at the reply stage of taking testimony. I cannot continue your case, so your motion is denied.

.....

MR. BOINEAU: Since 8:00 o'clock last night when we finished, I attempted to obtain the several witnesses, but was unable since some of them are hostile. I have been trying to get them since 8:00 o'clock last night and I respectfully request to be granted sufficient time to do

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so and get a subpoena out, because it is very important.

THE COURT: Well, the request is denied. We are at the reply stage of taking testimony. Do you have any testimony, any further evidence?

MR. BOINEAU: I was unable to get the witness.

THE COURT: So, plaintiff rests? You have no further testimony?

All right. Gentlemen, that concludes the taking of evidence in this case. . . .

(c) Exceptions before South Carolina Supreme Court (Transcript 424-428)

.....

2. The trial judge erred in refusing appellant's motion made February 21, 1978 for a continuance of the trial of the case, the error being that appellant's previous counsel had unexpectedly and without prior warning withdrawn as counsel for appellant and appellant was without counsel to represent him; appellant was entitled to counsel and could not adequately represent himself; and the trial judge's refusal of appellant's motion for a continuance, under the circumstances then existing, constituted a denial of due process of law and a denial of the equal protection of the laws to which appellant was entitled under Article I, Section 3, of the South Carolina Constitution and the Fifth Amendment and Section I of the Fourteenth Amendment of the United States Constitution.

4. The trial judge erred in refusing appellant's motion made February 21, 1978 to continue the trial of the case until the next morning so as to permit him to engage other counsel to represent him, the error being that appellant's pervious counsel and unexpectedly and without prior warning withdrawn as counsel for appellant and appellant was without counsel to represent him; appellant was entitled to counsel and could not adequately represent himself; and the trial judge's refusal of appellant's motion for a continuance, under the circumstances then existing, constituted a denial of due process of law and a denial of the equal protection of the laws to which appellant was entitled under Article I, Section 3, of the South Carolina Constitution and the Fifth Amendment and Section I of the Fourteenth Amendment of the United States Constitution.

6. The trial judge erred in refusing appellant's motion for a voluntary non-suit without prejudice, the error being that appellant's previous counsel had unexpectedly and without prior warning withdrawn as counsel for appellant and appellant was without counsel to represent him; appellant was entitled to counsel and could not adequately represent himself or present his own case; and the trial judge's refusal of appellant's motion for a continuance, under the circumstances then existing, constituted a denial of due process of law and a denial of the equal protection of the laws to which appellant was entitled under Article I, Section 3, of the South Carolina Constitution and the Fifth Amendment and Section I of the Fourteenth Amendment of the United States Constitution.

8. The trial judge erred in refusing appellant's motion made February 22, 1978 for a temporary continuance of the case to permit replacement counsel to familiarize himself with the case, the error being that appellant's previous counsel had unexpectedly and without prior warning withdrawn as counsel, appellant was then without counsel to represent him but had arranged with other counsel to represent him provided the replacement counsel be allowed sufficient time to familiarize himself with the case; and the trial judge's refusal of appellant's motion for a continuance, under the circumstances then existing, constituted a denial of due process of law and a denial of the equal protection of the laws to which appellant was entitled under Article I, Section 3, of the South Carolina Constitution and the Fifth Amendment and Section I of the Fourteenth Amendment of the United States Constitution.

9. The trial judge erred in insisting upon and pushing trial of the case at an accelerated and abnormal pace in, inter alia, a) denying appellant's motions for a continuance of the trial, for a voluntary non-suit without prejudice, and even a temporary continuance as aforesaid, b) granting respondents' motion that all three cases be consolidated for trial despite a difference of parties, c) not recessing the first day's trial proceedings until approximately 8:00 p.m., well after the court's usual recess time of 5:00 p.m. and two hours later than the 6:00 p.m. set by the court earlier in the day for recessing the day's proceedings, d) insisting that appellant continue cross examination of respondents' witnesses without pause to permit appellant to review the documents involved or otherwise prepare for such cross examination. e) commencing the second day's proceedings at 9:00 a.m. instead of the usual 9:30 or 10:00 a.m., f) repeatedly

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refusing to allow appellant to read into the record, or to have the witness read into the record, for the purpose of the court's understanding of the point involved, even a single sentence of various documents about which the witness was being examined, g) insisting that appellant lend the court the appellant's one copy of the transcript of an earlier hearing (after neither the trial judge nor the Clerk of Court could find the original transcript) and then refusing to lend back to the appellant his own copy of the transcript, h) refusing appellant's request for a temporary delay to permit him to subpoena witnesses, and i) advising the parties that he did not desire any briefs, the error being that the trial judge's conduct of the trial deprived appellant of any opportunity to recover from the unexpected loss of his counsel and/or otherwise to prepare and present his own case, and constituted an abuse of discretion and a denial of due process of law and a denial of the equal protection of the laws to which appellant was entitled under Article I, Section 3, of the South Carolina Constitution and the Fifth Amendment and Section I of the Fourteenth Amendment of the United States Constitution.

d) Excerpts from petitioner's Petition for a Rehearing.

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1. This Honorable Court overlooked or misapprehended the fact that conduct of the trial court denied plaintiff-appellant due process of law.

2. This Honorable Court overlooked or misapprehended the plaintiff-appellant's position, and the authorities supporting the same, that the trial court's refusal of appellant's motion for a continuance, a voluntary non-suit

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or even a temporary recess to permit him to secure new counsel constituted a denial of due process of law and the equal protection of the laws.

RULES OF PRACTICE OF THE CIRCUIT
COURTS OF SOUTH CAROLINA

RULE 27

MOTIONS FOR CONTINUANCE

No motion for the postponement of trial beyond the term, either in the Common Pleas or General Sessions, shall be granted, on account of the absence of a witness, without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action, or defense of the party moving; that the motion is not intended for delay; but is made solely because he cannot go safely to trial without such testimony; that he has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the Court that his motion is not intended for delay. In all such cases where a writ of subpoena has been issued, the original shall be produced, with proof of service, or the reason why not served, endorsed thereon, or attached thereto; or if lost, the same proof shall be offered, with additional proof of the loss of the original subpoena.

A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

RULES OF PRACTICE OF THE CIRCUIT
COURTS OF SOUTH CAROLINA

RULE 45

Notwithstanding the provisions of any other Rules to the contrary, no case listed in the File Book which thereafter is settled or disposed of in any manner, shall be dismissed, marked ended, or stricken from the File Book except as follows:

1. An action may be dismissed by the plaintiff without order of Court (a) by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
2. Except as otherwise provided in this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the Order, a dismissal under this paragraph is without prejudice.

3. Stricken pursuant to the provisions of Rule 82.
4. Counsel in the case shall have prepared and filed an order signed by the Clerk of Court pursuant to the provisions of Section 10-1502.1, Code of Laws of South Carolina, 1962 [§15-35-30, Code of Laws of South Carolina, 1976]."